77-630

IN THE

Supreme Court of the United States

October Term 1977

No. 76-2373

NATIONAL BERYLLIA CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 9, 1977.

Opinion Below

There was no opinion of the Court of Appeals for the Third Circuit. The order of the Court is reprinted in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on September 9, 1977. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

Question Presented

Did the National Labor Relations Board violate Petitioner's due process rights by denying without a hearing the Petitioner's objections to a Board sponsored election which objections established, *prima facie*, union misconduct, and granting summary judgment for unfair labor practices against Petitioner for Petitioner's failure to bargain.

Statement of the Case

Petitioner seeks to reverse the decision of the Court of Appeals enforcing the order of respondent National Labor Relations Board to Petitioner to commence bargaining with Local 177, International Brotherhood of Teamsters (the "Teamsters" or the "Union") for a contract covering certain workers at petitioner's plant in Haskell, New Jersey.

Petitioner submits that pre-election misconduct by the Teamsters violative of this Court's ruling in *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973) required the Court of Appeals to dismiss the Board's application for enforcement of its bargaining order.

On December 11, 1974, a representation election was held among Petitioner's bargaining unit employees pursuant to a direction of election issued by the National Labor Relations Board, Twenty-second Region (the "Region") in which Petitioner, the Teamsters and an intervenor union participated.

On December 16, 1974, Petitioner timely filed objections as to pre-election conduct affecting the election results (A4)*. Objections 1 and 2 (A4) urged by Petitioner concerned representations made by the Teamsters that those

* Numbers in parentheses preceded by the letter "A" refer to the Appendix filed by the Board.

who signed Teamster authorization cards and/or aided the Teamster's organizing effort would be rewarded by a waiver of initiation fees amounting to $100-$150. This promise by the Teamsters as to waiver of initiation fees was echoed in a letter the Teamsters sent to the employees a day or two before the election which proclaimed that the waiver applied to those "considered part of a newly formed group." (A8)

Petitioner, in support of its election objections, provided the affidavits of two bargaining unit employees, Louis Macaluso and Elizabeth Gulino, and a Company official attesting that the employees were promised a waiver of initiation fees in exchange for their authorization cards and pre-election union support.

Mr. Macaluso stated that in September, 1974, Mr. Benale, Teamster general organizer, at a mass meeting of employees

> . . . promised me and other employees of National [Petitioner] that if we signed an authorization card for Local 177 before the election and/or became part of a newly formed group of new employees who supported Local 177 in its efforts to organize the employees of National, we would not have to pay the $100-$150 individual initial fee for Local 177. (A31(a)-A31(b)).

Mr. Macaluso also stated that this promise was repeated by Mr. Benale at "several subsequent meetings of National employees." (A31(b)).

Ms. Gulino stated in her affidavit that Mr. Benale at a mass meeting in August 1974, in urging the employees to sign authorization cards for Local 177, said:

> . . . that as part of a newly formed group of employees who supported Local 177 in its effort to

> organize the National employees, I would not have to pay the $100-$150 initiation fee at Local 177 . . . [and further] that those who signed cards before the election would become part of a new, or charter group, and could become a member of Local 177 without having to pay the initiation fee. . . . I then signed the authorization card. (A31(d)-A31(e)).

Ms. Gulino thus signed a union authorization card on the basis of Mr. Benale's representation that she would not have to pay the initiation fee.

The Regional Director issued its decision dated April 22, 1975 (A32) overruling Petitioner's objections and certifying the Teamsters as the collective bargaining representative of Petitioner's employees (A49). The Regional Director based his ruling on an investigation conducted pursuant to 29 C.F.R. § 102.69 (Series 8 of the Board's Rules and Regulations) (A34).

The ruling disclosed that the employee affiants had been "reinterviewed" and had recanted.* The Regional Director also relied upon, and quoted from, an affidavit by Teamster organizer Primo Benale (A36) and also gave weight in his decision to "random interviews" of unnamed and unnumbered employees (*ibid*) allegedly corroborating Benale.** The Regional Director ignored the promise of the waiver of initiation fees set forth in the Teamster letter. No hearing was held by the Regional Director to resolve the disputed issues of fact respecting the election objections.

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* The Regional Director quoted from his affidavits of these witnesses. (A13-15). However, the Board has refused to make these affidavits part of the Record.

** Neither the Benale affidavit nor the "random interviews" have been made a part of the record, and to this day, respondent has no idea of their contents other than what the Board has chosen to quote.

In reading the Regional Director's decision, Petitoner first discovered the existence of new affidavits from its employee witnesses. When Petitioner learned that Board investigators had coerced the employees to retract their affidavits, it obtained supplemental affidavits volunteered by the two employees (A60).

Ms. Gulino's third affidavit* disclosed that: the Board agent asked her if she knew the meaning of perjury (A77); he told her he "absolutely would not allow" her lawyer to review the statement she was told to sign (A81); she was confused by the agent's suggestion that if she had not previously quoted Mr. Benale's statements word for word in relating the promises that had been made at organizational meetings, then she must have lied (A80).

Ms. Gulino firmly adhered to her original statement (A80):

> Whatever the statement says, I am still sure that Mr. Benali [sic] said that as long as I was part of the group formed to organize at the plant I would be exempt from the initiation fees. This I told to the Board Agent, and it should be in the statement obtained from me by the Board Agent.

Ms. Gulino reaffirmed that it was on the basis of Mr. Benale's representations that she signed an authorization card (A80):

> After I signed the representation card handed out by Local 177, I thought that since my name would be on the list of the organized group, I would not have to pay the initiation fees.

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* Since these employees made out three affidavits each, they will be referred to as the first, second and third sets of affidavits, respectively.

Mr. Macaluso's third affidavit shows that the Board agent similarly badgered him with implied accusations of perjury (A85):

> As the Board Representative kept questioning me about paragraph 2 of my Affidavit, I felt he was trying to get me to contradict myself. Since I had in mind what he said about perjury, I then thought I had better say about Mr. Benali's [sic] statement about initiation fees, 'I think he said that, but I'm not positive.' By that I meant I wasn't absolutely sure that Mr. Benali [sic] had used those exact words. But I still was sure that the meaning was the same.

Mr. Macaluso also affirmed his first affidavit (A85):

> I am still sure that Mr. Benali [sic] said that as long as I was part of the group formed to organize at the plant I would be exempt from the initiation fees. I told this to the Board Representative, but I do not know whether he put it in the written statement he later asked me to sign.
>
> * * *
>
> Further, I am absolutely certain that Mr. Benali [sic] said that those eligible to vote would not have to pay initiation fees, and that he never said anything about a contract in the context of the initiation fees, or that they would be waived for everyone up until the time a contract between National and Local 177 was signed.

In addition to the above affidavits, Petitioner urged the Board in a memorandum that the Regional Director must in conformity with the law hold a hearing with respect to the disputed factual issues (A60, A70-71).

On June 25, 1975, the Board denied Petitioner's request for review because it "raised no substantial issues warranting review" (A88). A motion for reconsideration was also denied.

The Teamsters then demanded contract negotiations (A94-5). Petitioner responded that, in its view, the union had not been legally certified.

Petitioner's failure to bargain precipitated the unfair labor practice proceeding against Petitioner on September 19, 1975 (Charge, A2). On December 4, 1975 the Board General Counsel filed a motion for summary judgment on the unfair labor practice complaint. Petitioner opposed the summary judgment motion on the ground that since a *prima facie* case for overturning the election had been presented the Board had unjustifiably denied a hearing for the proper evaluation of issues of fact and credibility (A98-9). Nonetheless, the Board granted the motion for summary judgment stating that the due process issues had been considered fully in the underlying representation case. (A106)

The Board thereupon applied to the Court of Appeals for enforcement of its bargaining order pursuant to its unfair labor practices determination. The Court of Appeals granted the application without opinion.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Delineated The Obligation Of The Board To Hold A Hearing Respecting Substantial And Material Factual Issues In Representation Cases.

The Board's refusal to grant Petitioner a hearing when Petitioner presented *prima facie* evidence of union pre-election misconduct was an abuse of the Board's discretion and violative of Petitioner's due process rights.

The regulations controlling the Board's conduct under the National Labor Relations Act make an investigation into election abuse obligatory, 29 C.F.R. § 102.69(c). Section 102.69(d)* does allow for some discretion by the regional director in holding a hearing. Nevertheless, the rule set forth by the appellate courts mandates a hearing on disputed factual issues as to election misconduct. This rule is set forth in Davis, *Administrative Law Text*, § 702 (1972) at p. 159:

> Reviewing courts have considered many cases involving the NLRB's denial of a hearing on questions about representation. Gradually the law has crystallized that *trial-type hearings are required by due process on issues of fact upon which representation depends*, but not required in the absence of such issues. (Emphasis added.)

The Supreme Court has never considered whether due process considerations mandate such a hearing.

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* 29 C.F.R. § 102.69(d) states in pertinent part:

The action of the regional director . . . in issuing a decision on objection or challenged ballot or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer.

In *N.L.R.B.* v. *Joclin Manufacturing Company*, 314 F.2d 627 (2d Cir. 1963) the Second Circuit faced a situation similar to the instant one. There, an employee's ballot was challenged after the election by the Union. The Union claimed the employee was not a sufficiently regular employee to be entitled to vote. The court noted that the employer had made a *prima facie* showing of eligibility based on a substantial number of hours regularly worked (*id.* at 632) but that the Regional Director chose to give greater weight to evidence obtained in an *ex parte* investigation. The *ex parte* investigation consisted primarily of an interview with the employee in which he allegedly "told a Board Agent that he never took the job seriously; that when he was hired he was told it was part time and that they would use him if they needed him and would call him." *Id.* at 633. The Company, much as does Petitioner in the present case (*id.* at 633):

> . . . attacked the propriety of considering [the employee's] statements to the Board agent, and requested 'that the challenge should be overruled or that the substantial and material factual issues be resolved in a full hearing'.

The Court held that the Board's professed need for expeditious procedures did not outweigh the necessity of a hearing, as provided in the Board's own regulations, where there were disputed issues of fact (*ibid*):

> Recognizing that the need for expedition in certification matters justifies the Board in imposing 'reasonable conditions to the allowance of a hearing on objections', *N.L.R.B.* v. *O.K. Van Storage Inc.*, 297 F.2d 74, 76 (5 Cir., 1961), we think a case like Rosania's—an employee who was *prima facie* eligible and is sought to be disqualified because of develop-

ments after the election and an alleged mental attitude disclosed in a private interview with a Board agent—comes squarely within the Board's Regulations and requires a hearing upon the Company's request.

The Court noted that while the language contained in 29 C.F.R. §102.69(d) provides that "the Board may direct" a hearing "if it appears to the Board that such exceptions raise substantial and material factual issues" (*ibid*), such language does not confer broad latitude on the Board to hold or not hold a hearing in particular cases if the issues are "substantial" and "material" (*ibid*):

> The Board properly has not contended either that the Regulations' use of the phrase 'appears to the Board' makes the determination conclusive, see *United States* v. *Laughlin*, 249 U.S. 440, 39 S.Ct. 340 63 L.Ed. 696 (1919), or that their use of the verb 'may' gives it an unfettered discretion to grant or deny a hearing. . . .

Thus the Court in *Joclin* agreed with the holding in *N.L.R.B.* v. *Sidran*, 181 F.2d 671 (5th Cir. 1950) and held that a Regional Director's unilateral resolution of disputed factual issues without a hearing was a violation of the employer's constitutional right to a fair hearing (314 F.2d at 631):

> In *N.L.R.B.* v. *Sidran*, 181 F.2d 671, 673 (5 Cir., 1950), the Board accepted a Regional Director's election report which determined disputed issues of voter eligibility on the basis of an *ex parte* investigation, without giving the employer an 'opportunity to be heard, to examine and cross-examine witnesses, or to produce any evidence in his own behalf which might have tended to impeach or contradict the facts

> found by the Regional Director as to the status of these challenged employees.' The court held that such action deprived the employer of his constitutional right to a fair hearing, and invalidated the Board's finding that he had committed an unfair labor practice in refusing to bargain with the certified union.

The Fifth Circuit has followed the Second Circuit's holding in *Joclin*. In *United States Rubber Company* v. *N.L.R.B.*, 373 F.2d 602 (5th Cir. 1967), the Board unilaterally resolved factual issues after an investigation of the employer's objections to a certification election. The objections of the employer focused on an eleventh-hour letter written to the employees by the union asserting that the wage rates and working conditions of a competitor's employees (represented by the same union) were markedly superior. The Board thereafter sought to enforce an order issued as a result of the employer's refusal to bargain.

The employer submitted "sworn objections [which] stated in detail respects in which statements in the letter . . . were claimed to be false." 373 F.2d at 605.

The Board claimed that its *ex parte* investigation, including an interview with the office manager of the competing firm, gathered evidence sufficient to conclude, without a hearing, that the representations in the union letter as to superior working conditions were not materially misleading. Like Petitioner, the employer in *United States Rubber* "at subsequent stages . . . submitted affidavits" challenging the integrity of the information obtained in the Board interview. *Id.* at 606.

The Court held that since there were substantial and material issues, the Board had denied the company due process and had acted arbitrarily and unreasonably:

> It is our opinion that the Board has acted arbitrarily and unreasonably. In the representation proceeding it should not have ruled on the employer's objections to the election without a hearing, for there were substantial and material issues which could be determined properly only by a hearing. *Id.* at 604.

Accord: *N.L.R.B.* v. *Bata Shoe Company,* 377 F.2d 821, 825 (4th Cir.), *cert. denied* 389 U.S. 898 (1967)

The Court in *United States Rubber* also considered what an employer must show to entitle it to a hearing on election objections. The court held that a hearing was required on evidence which *prima facie* would warrant the setting aside of an election (at 606):

> To be entitled to a hearing the objector must supply the Board with specific evidence which prima facie would warrant setting aside the election, for it is not up to the Board staff to seek out evidence that would warrant setting aside the election . . . [Citations omitted] Just how specific must the evidence be to meet the standard? Here the objections were not 'nebulous and declaratory assertions, wholly unspecified,' nor equivocal hearsay, but clearly put in issue the correctness of what was said in the letter—this was 'specific evidence of specific events from or about specific people.'

The duty of the Regional Director to hold a hearing when confronted with a case involving *bona fide* disputes of fact on material post-election objections was reaffirmed in

N.L.R.B. v. *Capital Bakers, Inc.,* 351 F.2d 45 (3rd Cir. 1965). There, as here, the Board overrode the employer's post-election objections on the basis of a unilateral investigation without a hearing. The court held that the Regional Director was without discretion to deny the employer a hearing in light of substantial and material questions of fact. The court in *Capital Bakers* noted that where the question is whether a hearing should have been held, the decisive issue is not whether there was ample evidence to support the conclusion drawn by the Regional Director, but whether there was at least some probative evidence marshalled on the other side (*id.* at p. 51):

> We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the findings; we are solely concerned with the fact that *the offer and findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing.* (Emphasis added.)

The court made it clear that a hearing could not be denied the employer on the theory that the issue was properly addressed in the first proceeding:

> Respondent requested an opportunity to have these facts determined by a hearing. This was denied, and its subsequent request to the Board for hearing was denied. The nature of the evidence which respondent wished to present is revealed both in its Request for Review and in its offer of proof before the Trial Examiner on the unfair labor practice proceeding. The respondent there set forth in detail several factual matters which it offered to

> prove to contradict facts found by the examiner in his report based on ex parte investigation. . . . *If this* [the presence of a substantial conflict of fact] *was not apparent to the Board at any prior stage it became clearly apparent at the Trial Examiner's hearing. The circumstances compelled a hearing at the very least, at this stage.* (Emphasis added.)

As in *Capital Bakers*, the error here of the Regional Director in refusing to hold a hearing was compounded in each succeeding level of determination that presumed the validity of the underlying certification proceedings.

The Ninth Circuit has gone beyond the holdings of the Second, Third, Fourth and Fifth Circuits in requiring a hearing respecting election objections. In *N.L.R.B.* v. *Ames Co.*, 450 F.2d 1209 (9th Cir. 1971), employee affidavits submitted by the employer contradicted the *ex parte findings* of the Regional Director. The Court held that even if the employer's objections, on their face, would not warrant setting aside the election, a hearing is required.

In granting the application of the N.L.R.B. for enforcement of its bargaining order in this case, the Third Circuit has contradicted the uniform rulings of the other Circuits and its own decision in *Capital Bakers*. We submit that the Supreme Court should now determine whether due process considerations compel a hearing respecting disputed and material factual issues as to pre-election misconduct.

II. This Important Question Was Wrongly Decided Below.

The Third Circuit's decision enforcing the N.L.R.B.'s bargaining order ignored the *prima facie* demonstration by Petitioner that the Teamster's pre-election conduct violated

the ban on waiver of initiation fees set forth in this Court's holding in *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973). As explained in Part I, it has been the consistent ruling by the courts of appeal which have considered the question that a *prima facie* demonstration of pre-election misconduct entitles Petitioner to a hearing on its objections. Here, since a *prima facie* demonstration was made, the Third Circuit at least should have denied the N.L.R.B.'s application for enforcement and remanded for a hearing on Petitioner's objections.

In *N.L.R.B.* v *Savair Manufacturing Company*, this Court enunciated the rule that a promise of a waiver of initiation fees to employees who sign union authorization cards prior to the election invalidates the election:

> Whatever his true intention, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the Union. His outward manifestation of support must often serve as a useful campaign tool in the Union's hands to convince other employees to vote for the Union, if only because many employees request their coworkers' views of the unionization issue. By permitting the Union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the Union to buy endorsements and paint a false portrait of employee support during its election campaign.
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> • • •
>
> We do not believe that the statutory policy of fair elections prescribed in the *Tower* case permits endorsements, whether for or against the Union, to be bought and sold in this fashion. (*Id.* at 277)

Clearly, *Savair* prohibits the Teamsters' pre-election promise to waive initiation fees as an inducement to sign authorization cards and for other support during the pre-election campaign. The affidavits submitted on behalf of the Company plainly establish that the Teamsters engaged in the prohibited conduct. As both Gulino and Macaluso stated in their first affidavits, the Teamsters promised to waive the initiation fees for those employees in the "newly formed group." The affidavits of these employees state that the Teamsters defined "newly formed group" to mean those workers who supported the Union's pre-election organizing drive and signed authorization cards.

The promise to waive initiation fees was reiterated in the Union's eleventh hour campaign letter to the employees (A-8).

In her first affidavit, Ms. Gulino also referred to the Union's promise to waive initiation fees for those employees who were part of a charter group. It is clear from Ms. Gulino's affidavit that the members of a charter group would be those employees who signed authorization cards before the election (at A31(e)):

> He further stated that all those who signed cards before the election would become part of a new or charter group and could become a member of Local 177 without having to pay the initiation fee.

Even if the Teamsters had left the terms "newly formed group" or "charter group" undefined, its interpretation by the employees would require a holding that the *Savair* rule was violated or that a hearing on Petitioner's objections was necessary. In *Inland Shoe Manufacturing Co., Inc.*, 86 L.R.R.M. 1498 (1974), the Board overturned an election on the basis that the employees "could reasonably have concluded that it was to their benefit to join Petitioner before the election . . . to avoid the possibility of having to pay initiation fees later." As is clear from Ms. Gulino's first and third affidavits, she concluded that it was to her benefit to join the Union in order to avoid payment of the initiation fees.

Moreover, use of the undefined phrase "charter membership" was held to be improper by the Board under the *Savair* rule in *D.A.B. Industries, Inc. and International Union, Allied Industrial Workers of America, AFL-CIO*. 87 L.R.R.M. 1738 (1974). There, a Board panel held unlawful an initiation fee waiver contingent on charter membership in the Union, even though dues were waived for everyone until a contract was negotiated and ratified (*id.* at 1739). Similarly, in *Coleman Company, Inc. and Viola Clark*, 87 L.R.R.M. 1004 (1974), the Board held that a promise to waive initiation fees for those employees making application for "charter membership" violated *Savair*. There is no meaningful distinction between the terms "charter group" or "newly formed group" as used by the Teamsters in its campaign and "charter membership" which *D.A.B. Industries, Inc.* and *Coleman Company, Inc.* held illegal.

In another Board case, *Rounsaville of Tampa, Inc. and Teamster, Local 79*, 92 L.R.R.M. 1344 (1976), the Board directed a hearing to resolve the ambiguity of the union's term "future members" to whom its initiation fee waiver did *not* apply. In a letter the union had informed the employees that "[t]here is an initiation fee, for future members, why deny the truth" (*id.* at 1345) and failed to define or otherwise explain in the letter who belonged to the group composed of "future members".

Petitioner has made out a *prima facie* demonstration of pre-election misconduct and is entitled to a hearing. Team-

ster organizer Benale's partisan claim that the union's past policy was to waive initiation fees for all employees during an organizational drive is irrelevant. As the Board panel stated in *D.A.B. Industries* (*id.* at 1739):

> That it has been Petitioner's past practice to waive initiation fees for those employed when Petitioner obtains a contract with the employer in no way serves to remove or clarify this ambiguity. For apart from the absence of evidence of employee awareness of such a past practice, it would be difficult for employees to reconcile the past practice with the front side of the card's conditioning waiver upon "charter membership" and the reverse side's assurance of "No Initiation Fee." Evidence of past practice thus not only fails to resolve the ambiguity but adds to the confusion.

Nor do the contradictory employee affidavits refute Petitioner's *prima facie* showing of pre-election misconduct. As the Third Circuit itself pointed out in *Capital Bakers, supra,* a hearing would be required on the basis of any probative evidence submitted by Petitioner. Such evidence is contained in the first and third affidavits of Petitioner's employees and the Teamster letter.

Indeed, that the employees contradicted themselves in their second affidavits indicates the need for a hearing. As the Fifth Circuit recently stated in *Modica* v. *United States*, 518 F.2d 374, 376 (5th Cir. 1975), a sworn denial of previous admissions "ordinarily creates an issue of disputed fact. . . ." Here, Board investigators coerced Petitioner's employees to retract their prior affidavits in an apparent attempt to prevent Petitioner from making a *prima facie* showing of pre-election misconduct. The employees were

accused of lying. They were forced to sign affidavits without being allowed to consult their lawyer despite their requests to do so. Moreover, the affidavits did not reflect their true testimony. In short, Petitioner's employees were forced to sign affidavits which conflicted with their prior affidavits under conditions supposedly prohibited by the Constitution and Bill of Rights. A hearing is thus needed to determine whether the prohibited Teamster conduct set forth in the first and third affidavits in fact occurred. A hearing is also needed so that the testimony of the witnesses may be obtained unfettered by the coersive conduct of supposedly impartial Board investigators.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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Judgment Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2373

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NATIONAL BERYLLIA CORPORATION,

Respondent.

(Board No. 22-CA-6543)

On Application for Enforcement of an Order of the National Labor Relations Board.

Submitted Under Third Circuit Rule 12(6)
September 7, 1977

Before:

SEITZ, *Chief Judge,*
GIBBONS AND WEIS, *Circuit Judges.*

On the Application of the National Labor Relations Board for enforcement of its order dated March 5, 1976,

It is ORDERED, ADJUDGED and DECREED that the Application for enforcement is granted and the order dated March 5, 1976 be and is hereby enforced. Costs shall be taxed against Respondent.

By the Court,

COLLINS J. SEITZ
Chief Judge

Attest:
THOMAS F. QUINN,
Thomas F. Quinn,
Clerk

Dated: Sep. 9, 1977

77-630

IN THE

Supreme Court of the United States

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No. 76-2373

NATIONAL BERYLLIA CORPORATION,

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGION

NATIONAL BERYLLIA CORPORATION,
Employer,
and

LOCAL 177, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner.

Case No. 22-RC-6172

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued in this matter on November 15, 1974[1] an election by secret ballot was conducted on December 11, 1974, under the direction and supervision of the undersigned in a unit found appropriate for collective bargaining.[2] Thereafter, a tally of ballots was duly served upon the parties showing that of

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[1] Regional Decision #55-74 (unpublished).

[2] The unit appears as follows:

> All production and maintenance employees, including production control employees, employed by the Employer at its Haskell, New Jersey location, excluding all office clerical employees, professional employees, (including engineers), technicians, guards and supervisors, as defined in the Act.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

approximately 125 eligible voters,[3] 115 cast valid ballots, of which 72 were cast for the Petitioner, 1 was cast for the Intervenor,[4] 42 were cast against the participating labor organizations and 7 ballots were challenged, which were not determinative, resulting in a majority of the valid votes counted being cast for the Petitioner.

Pursuant to Section 3(b) of the National Labor Relations Act as amended, the Board has delegated its powers in connection with this proceeding to the undersigned Regional Director.

Thereafter, the Employer anl Intervenor[5] timely filed objections to conduct affecting the results of the election as follows:

EMPLOYER'S OBJECTIONS:

1. In violation of the National Labor Relations Act, as amended ("NLRA"), and several months prior to the election Local 177 promised employees within the bargaining unit to waive initiation fees if, prior to the election, they signed authorization cards for Local 177 and/or become part of a newly formed group of employees who supported Local 177 in its efforts to organize National. Said promise was repeated in writing to this group of employees on or about the day of the election.

[3] It is noted that the tally of ballots herein inadvertently indicated the approximate number of eligible voters as 125, whereas the correct figure is 145. I find it unnecessary, however, to issue a revised tally of ballots as this error has no material effect with respect to the outcome of the election herein.

[4] International Association of Machinists and Aerospace Workers, District 15, AFL-CIO.

[5] By letter dated February 4, 1975, the Intervenor withdrew its objections.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

2. In violation of the NLRA, the promise referred to in paragraph 1 as to waiver of initiation fees was made prior to the election and on the day of the election to all employees who voted.

3. On the day of the election and prior thereto Local 177 made statements to the employees, including a written mailing reaching the employees at their homes only a day or two before the election, seriously misrepresenting facts relating to National and its employees. These false and deceptive claims, designed deliberately to influence the voting in favor of Local 177, included the following:

(a) That National instituted wage reductions for "most employees";

(b) That those eligible to vote included terminated employees and that otherwise their names "would not have been placed on the eligibility list sent out by the National Labor Relations Board . . ."

(c) That such and other claims had been "verified by our attorneys".

Because these misrepresentations did not come to the attention of National until too late for National to respond within the time allowed by law, they constitute coersion (sic) of the employees in violation of the NLRA, and an unfair labor practice.

4. Local 177 through its representative improperly electioneered at, in and around the polling place immediately preceding and during the election in violation of the NLRA, fatally prejudicing the election in favor of Local 177 and to the harm of National and its employees.

5. On or about December 10, 1974, and within 24 hours of the election, the General Organizer of Local 177 in a mass meeting of the employees called by Local 177 denied that he had lost his election in the Union to remain as General Organizer, deceiving the employees in causing them to believe he would represent them in any future negotiations with National and that the union membership was in favor of retaining him as General Organizer.

At this meeting misrepresentations reinforced subsequently by letter were made to the employees without the opportunity for National to respond and in violation of the NLRA.

6. The Board instructed National to post a defective Notice of Election, which Notice National duly posted, and which Notice the Board subsequently ordered National to remove and replace with an amended Notice, causing the status quo to be affected adversely to National in that National was forced to explain the error to the employees and therefore indirectly and implicitly assume responsibility for the error.

By the above and other actions preceding and during the election the Board and Local 177 caused great harm and prejudice to National and its employees, all in violation of the NLRA.

For these and other reasons National hereby requests that the results of the election be set aside.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made, during which all parties were afforded full opportunity to submit

evidence bearing on the issues involved. The undersigned has considered the objections, and, on the basis of the evidence adduced in the investigation, including the evidence submitted by the parties, finds as follows:

OBJECTION NOS. 1 AND 2:

As these objections are related, they will be considered together. The Employer asserts herein that the Petitioner made unlawful promises of benefit by offering, in writing and orally, a waiver of initiation fees to induce employees to support Petitioner by signing authorization cards and voting for Petitioner.

In support of its objections, the Employer submitted a three-page leaflet (herein attached as Exhibit A), distributed by the Petitioner to unit employees, which stated in pertinent part: "REMEMBER-THERE IS ABSOLUTELY NO INITIATION FEE—EVEN IF YOU ARE NOW LAID-OFF, AS YOU ARE STILL CONSIDERED PART OF A NEWLY FORMED GROUP." The investigation disclosed that this leaflet was mailed by Petitioner to unit employees on or about December 6, 1974, and received by them during the week of the election[6], and that it was posted on at least one bulletin board in the Employer's plant on or about December 10, 1974.[7]

In further support of its objections, the Employer proffered two employee witnesses, one of whom initially stated, in an affidavit supplied by the Employer that at several meetings conducted by Petitioner prior to the election Petitioner's Recording Secretary, Primo Benale, allegedly stated, *inter alia*, "if we signed an authorization card for

[6] The election herein was conducted on December 11, 1974.

[7] There is no evidence that Petitioner was responsible for said posting.

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Local 177 before the election and/or became part of a newly formed group of new employees who supported Local 177 in its efforts to organize the employees of National, we would not have to pay the $100-$150 individual initial fee for Local 177". The second employee witness proffered by the Employer stated, in an affidavit supplied by the Employer, that at a mass meeting of employees conducted by Petioner in August 1974, Benale stated, *inter alia* "that as part of a newly formed group of employees who supported Local 177 in its efforts to organize the National employees I would not have to pay the $100-$150 initiation fee at Local 177", and "that all those who signed cards before the election would become part of a new or charter group, and could become a member of Local 177 without having to pay the initiation fee." Both employee witnesses stated that the promise to waive initiation fees was repeated at several subsequent meetings conducted by Petitioner.[8]

During the course of the investigation, both employee witnesses proffered by the Employer were reinterviewed by an investigating Board agent. The first employee wit-

[8] It is uncontradicted that the Petitioner conducted four Union campaign meetings (August 15, 1974, September 17, 1974, December 3, 1974 and December 10, 1974) prior to the election herein, which were each attended by approximately 40-60 employees. Primo Benale was the only representative of Petitioner present at these meetings which took place at a local tavern near the Employer's premises. It is noted that the first meeting, August 15, 1974, occurred prior to the filing of the petition in this matter on August 16, 1974. It is well settled that the Board will not consider election objections based upon interference which occurred outside the "critical period" which begins with the filing of a petition and ends with the election. *Goodyear Tire and Rubber Company*, 139 NLRB 453. In the instant case, statements allegedly made at the first meeting were later repeated at subsequent meetings and accordingly are noted herein for the purpose of establishing a complete context.

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ness stated, in a supplemental affidavit that his earlier affidavit, prepared by the Employer, was in "error" regarding the matter of the waiver of initiation fees, and in this connection Benale, at the September 1974 meeting, the first meeting which this employee attended, allegedly said," . . . any employee at National even if laid-off would not have to pay initiation fees", and ". . . new employees hired after a contract was signed with National would have to pay initiation fees of $100 to $150". This employee witness further stated that Benale, at no time offered a waiver of initiation fees contingent upon signing an authorization card or supporting Petitioner in the election. In addition, he stated, in his supplemental affidavit, that Benale said ". . . employees of National, being a newly formed group would have initation fees waived", and "New employees hired after a contract would have to pay initiation fees". This employee attended Petitioner's subsequent two meetings and stated that Benale's statements regarding waiver of initiation fees did not vary.

With regard to the second witness proffered by the Employer,[9] in her supplemental affidavit stated, *inter alia*, that Benale said at the August 15, 1974 meeting ". . . that once the company was organized and a contract had been signed then all new employees and any new union members would have to pay initiation fees." She further stated, in her supplemental affidavit, that she did not recall Benale "saying anything to the effect that in exchange for signing a union card or supporting Local 177, initiation fees would be waived," and that "He never said anything like that." In explaining the apparent contradiction between her two

[9] This employee witness attended all four meetings conducted by Petitioner.

statements, the initial statement supplied and prepared by the Employer and her supplemental affidavit, given to an investigating Board Agent, she stated that the statements attributed to Benale contained in the affidavit prepared by the Employer "refer to my interpretation of Benale's statements and not his actual statements," and "His actual statements are as described herein above in this statement." [10]

Benale, in an affidavit, stated that it is the Petitioner's policy to waive initiation fees for all employees during an organizational drive and that this waiver is not contingent upon signing authorization cards or supporting Petitioner. Benale further stated that, at meetings referred to heretofore, he told employees, *inter alia,* that "Nobody pays initiation fees, they are waived up until the time we have a contract," and "Any new employee that is hired after we have a contract with the Company will have to pay intiation fees."

In this connection, random interviews of unit employees who attended Petitioner's meetings, corroborated Benale in all material respects. Upon examination, it is clear, and I so find, that the statements attributed to Benale in the supplemental affidavits of the two employee witnesses proffered by the Employer, as described above, are strikingly similar to Benale's version.[11]

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[10] This statement refers to her supplemental affidavit.

[11] As the supplemental affidavits of the two witnesses proffered by the Employer do not contradict Benale's statements, and noting that there is independent corroboration by other unit employees, I find that the initial affidavits submitted by the Employer, as heretofore described, do not raise any material issue regarding credibility with respect to oral statements attributed to Petitioner.

The Supreme Court in *N.L.R.B.* v. *Savair Manufacturing Company,*[12] held that a union's offer to waive initiation fees for employees who sign union authorization cards before a Board conducted representation election, interferes with employees' free choice in the election. In addition, the Court characterized the waiver of initiation fees as a legitimate interest of the union in eliminating an "artificial obstacle," for example, the expense of representation, from the employees' free choice in the election. This union interest "can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." The availability of this waiver to all employees eligible to vote in the election, whether they should join the Petitioner before or after the election, ensures that the waiver has not been conditioned upon support of the union in any form. The absence of such conditions avoids the creation of any impression that employees who refrain from supporting the Petitioner would be penalized therefor in comparison with those employees who support the Petitioner during the electoral campaign.[13]

The Employer contends that the phrase "newly formed group" as utilized in Petitioner's leaflet (Exhibit A) and verbally, as heretofore described (". . . employees of National, being a newly formed group would have initiation fees waived"), created sufficient ambiguity so that employees could reasonably conclude that the waiver would be conditioned on their joining or supporting Petitioner prior

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[12] 414 U.S. 270, 84 LRRM 2929 (1973).

[13] *N.L.R.B.* v. *Savair Manufacturing Company, supra; Con-Pac, Inc.,* 210 NLRB No. 70 [supplementing 207 NLRB No. 105]; *Endless Mold, Inc.,* 210 NLRB No. 34.

to the election. In *Inland Shoe Manufacturing Co., Inc.*,[14] a union promised in a leaflet distributed to employees that "There are no initiation fees for charter members of a new local (and that is what you would be)[.]" The Board concluded that Petitioner's offer to "charter members" was ambiguous and subject to various interpretations and was the kind of pre-election offer of waiver of initiation fees condemned by the Supreme Court in *Savair*. In this connection, the Board further concluded that employees could well have been induced to become early card signers on the reasonable belief that only thereby could they be "charter members" eligible for a waiver of initiation fees. Furthermore, in the circumstances therein, the Board found that it was unclear from the leaflet when employees must join the union to be eligible for the waiver and that the term "charter member" itself connotes that an employee need be a member before he can become a "charter member." In addition, the Board noted that part of the thrust of the union's leaflet was to urge employees to sign cards at once. However, the Board, in *GTE Lenkurt, Incorporated*[15] held that the use of the term "charter member" did not create ambiguity in which employees could reasonably conclude that the waiver would be conditioned on their joining the union prior to the election, when that term was viewed in the totality of circumstances existing therein, particularly the clear and repeated expressions of union policy throughout the election.[16]

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[14] 211 NLRB No. 73. See also *The Coleman Co., Inc.*, 212 NLRB No. 129 for a similiar analysis.

[15] 215 NLRB No. 53 (supplementing 209 NLRB No. 91).

[16] *Smith Company of California, Inc.*, 215 NLRB No. 97; *Western Refrigerator Co., Subsidiary of The Hobart Manufacturing Co.*, 213 NLRB No. 40.

The waiver, in the instant case, made by Petitioner in its leaflet and orally was, and I so find, available to all voters in the election. As the evidence adduced during the investigation disclosed, the waiver herein was not conditioned upon the expression of support for Petitioner in any form during the electoral campaign. In this regard, the Employer's witnesses, as described heretofore, stated, *inter alia*, that the Petitioner promised "any employee at National even if laid off would not have to pay initiation fees" —"employees of National, being a newly formed group would have initiation fees waived"—"that once the Company was organized and a contract had been signed, then all new employees and any new union members would have to pay initiation fees." Furthermore, the investigation revealed that the Petitioner had an established policy of waiving initiation fees for all employees during organizational campaigns regardless of whether they supported the Petitioner, and so advised employees of the Employer herein. In addition, I find that Petitioner's leaflet is devoid of urgings to employees to sign authorization cards.[17] Based upon the totality of circumstances existing herein, I find that the term "newly formed group," in Petitioner's leaflet and statements could only be interpreted by the employees to include all present employees who joined the Petitioner at least up to the time a collective bargaining agreement existed. In this connection, it is clear that the Petitioner, on a number of occasions, told employees that the waiver would apply until a "contract had been signed." Clearly, in these circumstances, the waiver was made available to

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[17] Cf. *Inland Shoe Manufacturing Co., Inc., supra.*

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all employees, not only before but subsequent to the election, since the Petitioner had to be certified as the bargaining representative before a contract could be negotiated and signed. In addition, I find that the term "newly formed group" unlike "charter member" does not inherently connote a requirement that the employee first join or support Petitioner in order to benefit from the waiver.[18] After carefully examining Petitioner's leaflet and oral statements, I find that they do not contain the elements of interference that the Supreme Court focused on in *Savair*.[19]

Based on the foregoing,[20] I find that Employer's Objection Nos. 1 and 2 raise no substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection Nos. 1 and 2 are overruled.

OBJECTION No. 3

The Employer contends herein that the Petitioner, by oral and written statements, made material misrepresentations of fact to all eligible voters, to which the Employer did not have an opportunity to respond, thereby warranting that the election be set aside. In particular, the Employer alleges that Petitioner's leaflet (Exhibit A) materially mis-

[18] Webster's International Dictionary, 2nd Edition, defines group as "an assemblage of persons or things regarded as a unit."

[19] *N.L.R.B.* v. *Savair Manufacturing Company, supra; Smith Company of California, Inc., supra; Western Refrigerator Co., Subsidiary of The Hobart Manufacturing Co., supra; GTE Lenkurt, Incorporated, supra; Endless Mold, Inc., supra; Con-Pac, Inc., supra;* see also Cf. *Inland Shoe Manufacturing Co., Inc., supra;* Cf. *The Coleman Co., Inc., supra.*

[20] Contrary to the Employer, I find that the additional fact that the timing of Petitioner's leaflet and oral waiver occurred shortly before the election herein is not material, as I have found the waiver itself not to be objectionable.

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represented: (1) a previous action by the Employer regarding wages by stating, *inter alia*, that in August, 1974 "most employees took a 'wage-cut' "[21] and (2) the eligibility of certain allegedly terminated employees by stating in pertinent part:

ARE YOU ELIGIBLE TO VOTE?

YES

> or your name would not have been placed on the eligibility list sent out by the N.L.R.B. and you would not be receiving this letter. . . .

Furthermore, the Employer contends that Petitioner's leaflet was false and misleading when it stated at the bottom of page 1, in bold print, "THIS IS ALSO VERIFIED BY OUR ATTORNEYS," thereby giving the entire leaflet credence. In addition, the Employer contends that the Petitioner, at union campaign meetings,[22] made material misrepresentations in statements to employees to the effect that (1) the Employer had spent thousands of dollars in attorney fees to prevent Petitioner from being certified by the Board and (2) the Petitioner had not assessed its members to support sympathy strikes including the then current United Parcel Service strike in New York.

[21] Subsequent to the investigation conducted herein, the Employer, on March, 1975, submitted a letter dated November 29, 1974 (herein attached as Exhibit B), purportedly mailed to unit employees by the Petitioner which states in pertinent part: "Just keep in mind the wage cuts that most of the employees were forced to take back in the early part of August. . . ." It is noted that the Employer allegedly had no knowledge of Petitioner's letter until subsequent to the election. I have carefully considered this letter and I find that it does not materially differ from Exhibit A, in pertinent part, and accordingly, they will be considered together, *infra.*

[22] These meetings are enumerated in fn. 8, *supra.*

With regard to the Employer's wage structure for unit employees, the investigation revealed that effective August 1, 1974, the Employer instituted a new wage program as a result of an industrial engineering analysis which established job descriptions and salary ratings. As a consequence, of approximately 155 unit employees, 104 had no wage change (67%), 36 received wage-rate increases (23%) and 15 wage-rate cuts (10%). In these circumstances, it is clear that Petitioner's leaflet and letter are in error when they state that "most" employees received wage cuts in August.

In deciding cases where objections to an election have been filed alleging that one party misrepresented certain facts, the Board balances the right of employees to an untrammeled choice and the right of the parties to wage a free and vigorous campaign with all the legitimate tools of electioneering. In striking this balance, the Board has promulgated the following rule—

> But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimus* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.[23]

It is well settled that mere falsity does not alone constitute campaign trickery which warrants setting aside an election. It is only where one of the parties deliberately misstates material facts which are within its special knowledge and where the employees are unable properly to evaluate the misstatements, that the Board will set the election aside.[24] Applying these principles to the instant case, it is clear that the misstatement regarding wage cuts was not within the special knowledge of the Petitioner. Indeed, it is likely that the employees had as much information as Petitioner with respect to the Employer's institution of a new wage-rate structure. Moreover, by its own admission, the Employer had at least 30 hours prior to the election to respond to Petitioner's leaflet, but chose not to avail itself of the opportunity.[25] In these circumstances, I find that the statements were not so misleading as to prevent the exercise of a free choice by the Employees or that the statements had a real impact on the election.[26]

With respect to the Employer's second contention herein that Petitioner's leaflet materially misrepresented the eligibility of certain allegedly terminated employees, I have

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[23] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

[24] *Modine Manufacturing Company*, 203 NLRB No. 77; *Uniroyal, Inc.*, 169 NLRB 918; *Hollywood Ceramics Company, Inc., supra; The Cross Company*, 123 NLRB 1503.

[25] *Modine Manufacturing Company, supra.*

[26] *Modine Manufacturing Company, supra; Uniroyal, Inc., supra; Hollywood Ceramics Company, Inc., supra; The Cross Company, supra; Craft Manufacturing Co.*, 122 NLRB 341.

carefully considered the contents of Exhibit A in its entirety and I find that there is no reference therein to the eligibility of terminated employees. I thus find that there is no evidence to support this contention.[27]

With respect to the Employer's third contention herein that Petitioner's leaflet was false and misleading when it stated, in bold print, that Petitioner's attorneys had verified it, I find no merit to this assertion. I have carefully considered the contents of Exhibit A in its entirety and find that it is not misleading. Therefore, I find that the leaflet did not interfere with the free choice of the employees.[28]

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[27] In this connection, although not raised as an objection to the election, the investigation disclosed that the Employer, on or about Noven ber 22, 1974, timely submitted a voter eligibility list containing 145 names. Thereafter, by letter dated December 2, 1974, the Employer submitted a list of 42 individuals whose names appeared on the list originally submitted and claimed that they had been "laid off for an indefinite period." The Employer, in a telephone conversation with a Board Agent prior to the election, contended that these 42 employees were ineligible to vote, however, their names were not deleted from the voter eligibility list herein. The investigation further revealed that 21 of the 42 individuals, contained on the Employer's list of laid-off employees, voted and that the Employer's observers challenged 4 of them. In these circumstances, it is clear that even if the remaining 17 voters, who voted without challenge, had all cast their ballots for Petitioner, it would not have affected the outcome of the election as the tally of ballots indicated that of approximately 115 valid ballots cast, 72 were cast for the Petitioner, 1 was cast for the Intervenor, 42 were cast against the participating labor organizations and 7 ballots were challenged. Moreover, it is noted that the Employer had the opportunity to challenge all 21 of the laid-off individuals but declined to do so. See *Oppenheim Collins & Co.*, 108 NLRB 1257.

[28] *Decorated Products, Inc.*, 140 NLRB 1383, 1385; *Modine Manufacturing Company, supra; Hollywood Ceramics Company, Inc., supra.*

With respect to Petitioner's oral statements regarding attorney fees and sympathy strikes assessments, which the Employer asserts are misstatements, the Employer has furnished no evidence that these statements are untrue. Petitioner's representative, Primo Benale, admits to stating "the company is spending a lot of money to keep the union out, like most companies will do." Moreover, the investigation revealed that the Petitioner has never assessed its members for the purpose of supporting a sympathy strike. In these circumstances, even assuming *arguendo* that Petitioner's statements are untrue, I find that they do not constitute grounds for setting aside the election. The Board, recognizing that parties in election campaigns often overstate their own virtues and the vices of others, has consistently held that exaggerations, inaccuracies and half-truths, although not condoned, will not be grounds for setting aside elections, provided that the statements are not so misleading as to prevent the exercise of a free choice by the employees in the selection of a bargaining representative.[29]

Based upon the foregoing, I find that Objection No. 3 does not raise substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 3 is overruled.

OBJECTION No. 4

The Employer asserts herein that the Petitioner interfered with the election by engaging in electioneering in and about the polling area on the day of the election.[30]

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[29] *Modine Manufacturing Company, supra; Hollywood Ceramics Company, Inc., supra.*

[30] The election was held on December 11, 1974 between the hours of 2:30 p.m. to 4:30 p.m. in the cafeteria located on the Employer's premises.

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The Employer specifically alleges that on the day of the election at approximately 2 p.m., his representative escorted the Board Agents and representatives of the Intervenor and the Petitioner to the polling area located within the cafeteria.[31] The Employer's representative stated, in an affidavit, that while the Board Agents were engaged in the process of setting up and arranging the polling area for the conduct of the election, Petitioner's representative, Primo Benale, initiated conversations with several groups of employees who were "milling about" the cafeteria.[32] The Employer submitted no evidence with respect to the content of these conversations. Benale, in an affidavit, admits to speaking to several employees, including Petitioner's observers, at various times during the approximately 30 minutes prior to the opening of the polls. However, he denies initiating these conversations which apparently dealt with the election process.

The Employer's representative further alleged that at approximately 2:20 p.m., Benale spoke to him in a loud voice, saying that a certain employee had been told by her supervisor that she would not be allowed to vote, and that "we'd better do something about it." The investigation revealed that the situation was defused when the Employer's representative stated, *inter alia*, that all who desired to vote could do so. Benale does not dispute this incident, although

[31] The cafeteria is approximately 100′ × 100′. The polling area itself, an open area of approximately 10′ × 15′, was located in the right-hand side of the cafeteria.

[32] The total number of employees present in the cafeteria prior to the opening of the polls at 2:30 p.m., ranged from approximately 10 to 20. It appears that some of these individuals were on coffee breaks whereas others were former employees (laid-off) waiting for the polls to open.

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he denies using a loud voice. It is uncontradicted that this incident occurred prior to the opening of the polls at 2:30 p.m.

The Employer submitted no evidence, nor did the investigation reveal any electioneering during the time that the polls were actually open.

It is well settled that sustained conversation with prospective voters waiting to cast their ballots regardless of the content of the remarks exchanged constitutes conduct which, in itself, necessitates a second election.[33] However, in the circumstances of the instant case, accepting *arguendo*, the Employer's version of the facts, it is clear that the electioneering alleged, was not addressed to voters "in line" waiting to vote. Rather, the alleged electioneering was directed at individuals "milling about" the cafeteria, in the vicinity of the polling area. Furthermore, it is clear that the conversations between Petitioner's representative and prospective voters took place within the half hour prior to the opening of the polls. It has neither been alleged nor did the investigation reveal that any electioneering took place during the period of time in which the polls were officially open. In these circumstances, it is clear that the *Milchem* doctrine is not applicable as voters were not waiting in line to vote nor were the polls open when the alleged electioneering occurred.[34]

Based on the foregoing, I find that Objection No. 4 raises no substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 4 is overruled.

[33] *Milchem Inc.*, 170 NLRB 362; *Harold W. Moore & Son*, 173 NLRB 1258.

[34] *Lincoln Land Moving & Storage, Inc.*, 197 NLRB 1238.

OBJECTION No. 5

The Employer asserts herein that Primo Benale, Petitioner's Representative[35] deceived employees at a union campaign meeting conducted on December 10, 1974, by not informing them of his changed status with Petitioner, thereby causing employees to believe that campaign promises made by him would still be fulfilled.[36]

In support of its objection, the Employer proffered two employee witnesses[37] who stated, in affidavits, that at the December meeting, Benale, in response to a question, denied losing his job with Petitioner. In their initial affidavits, supplied by the Employer, they stated that this denial led them to believe that promises made by Benale during the electoral campaign would be fulfilled and that Benale would represent the Petitioner in any subsequent collective bargaining negotiations with the Employer.

The investigation revealed that on or about November 10, 1974, Benale was defeated for the office of President of Petitioner in an internal union election. The investigation further revealed that Benale's term of office as Petitioner's Recording Secretary expired on December 31, 1974, at which time he assumed the position of Petitioner's organizer.

In the circumstances herein, accepting *arguendo*, the Employer's version of the facts, I find no misrepresentation or deception on Petitioner's part. In this connection,

[35] Benale's status with Petitioner will be discussed, infra.

[36] The December 10, 1974 meeting herein is one of the four union campaign meetings conducted by Petitioner as discussed in fn. 8, *supra*.

[37] It is noted that the two witnesses herein are the same individuals proffered by the Employer in support of Objection Nos. 1 and 2.

it is clear that at the time of the incident, December 10, 1974, Benale was Petitioner's Recording Secretary and when his term of office expired on December 31, 1974, he became Petitioner's organizer. As there is no evidence of a break in Benale's employment with Petitioner during the relevant and material period of time herein, and noting that his denial of loss of employment with Petitioner was a factually accurate statement, I find that Objection No. 5 raises no substantial or material issues with respect to conduct affecting the results of the election.[38] Accordingly, Objection No. 5 is overruled.

OBJECTION No. 6

The Employer contends herein that the election should be set aside on the grounds that there was insufficient time in which to overcome a plant rumor to the effect that the Employer was responsible for an error involving the replacement of official Board Notices of Election with amended Notices.

The investigation revealed that copies of official Board Notices of Election, in connection with the election herein, were mailed to the Employer on November 29, 1974. In the original Notice of Election, the Petitioner's name appeared on the left hand side of the sample ballot whereas the Intervenor's name appeared on the right hand side, contrary to the agreement of the parties. When this error came to the attention of the regional office, amended Notices, correcting the error, were mailed to the Employer on December 3, 1974, and the Employer was directed to remove the

[38] *Hollywood Ceramics Company, Inc., supra.*

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original Notices and replace them with the amended Notices.[39] The Employer does not contend nor did the investigation reveal that employees did not receive adequate notice of the time, date and place of the election.

With respect to the existence of an alleged rumor to the effect that the Employer was responsible for the error, I find, even assuming *arguendo* the existence of such a rumor, that it does not afford adequate grounds for setting aside the election. In this conection, the Employer had ample opportunity to reply to the rumor, and, admittedly, did so. There was no claim that the Petitioner originated, authorized, or approved the circulation of the rumor. Further, there is no claim nor did the investigation reveal any unawareness among employees of the time, date and place of the election. In these circumstances, the existence of the alleged rumor does not afford adequate ground for setting aside the election.[40]

Based on the foregoing, I find that Objection No. 6 does not raise substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 6 is overruled.

Having overruled the Employer's Objections in their entirety and as the Petitioner has received a majority of the valid votes cast in the election, I shall issue the following certification:

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[39] It is noted that the Employer fully complied with this direction.

[40] *Alladin Plastics, Inc.*, 182 NLRB 64; *West Texas Utilities Company*, 200 NLRB 1012.

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CERTIFICATION OF REPRESENTATIVE[41]

IT IS HEREBY CERTIFIED that Local 177, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has been selected by a majority of the employees of the above-named Employer in the unit herein involved as their representative for the purposes of collective bargaining and that pursuant to Section 9(a) of the Act, as amended, the said labor organization is the exclusive representative of all employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

ARTHUR EISENBERG
Arthur Eisenberg, Regional Director
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Dated at Newark, New Jersey
this 22nd day of April, 1975.

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[41] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by May 3, 1975.

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EXHIBIT "A"

DEPARTMENT STORE DRIVERS, WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 177

To Employees of N.B.C.

In the past week, the Company in its messages to you, has stressed its concern for you, but at the same time you should keep their past performances in mind, such as back in the month of August when most employees took a "wage-cut".

WHERE WAS THAT CONCERN AT THAT TIME ? ? ?

Enclosed copy will show that executives of N.B.C. did not. This would not have happened if you were protected by a written Teamster contract.

Company management in its own sly way claims that you will have to pay dues to be associated with Local #177. The history of unionism is that the small investment of dues is returned in far greater benefits, both in wages, in working conditions and future security.

REMEMBER—THERE IS ABSOLUTELY NO INITIATION FEE—
EVEN IF YOU ARE NOW LAID-OFF, AS YOU ARE STILL
CONSIDERED PART OF A NEWLY-FORMED GROUP.
ARE YOU ELIGIBLE TO VOTE?

YES

or your name would not have been placed on the eligibility list sent out by the N.L.R.B. and you would not be receiving this letter and as I also stated on the sample ballot posted at N.B.C., the voting unit shall consist of all employees on the payroll period ending November 3, 1974.

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THIS IS ALSO VERIFIED BY OUR ATTORNEYS.

THEREFORE, I urge you on behalf of your co-workers, who have shown great concern to be there to vote on Wednesday, December 11, 1974, from 2:30 P.M. to 4:30 P.M., so they will have a voice, concerning their WAGES and also yours, plus BENEFITS—WORKING CONDITIONS—PENSIONS—ETC.

We ask you to be present on Tuesday, December 10, 1974 at the Anchor Casino, at 3:30 P.M., so we may answer any questions that you have pertaining to the National Labor Relations Board election on December 11, 1974.

We ask you to keep these facts in mind when you cast your ballot on Wednesday, December 11th. We honestly feel Local #177 is the best choice for you and your co-workers. Vote for Local #177 as if your livelihood depends on it. IT DOES.

Sincerely,

LOCAL UNION NO. 177
PRIMO BENALE
Recording Secretary and Organizer

VOTE TEAMSTERS AND YOU WILL ALWAYS BE RIGHT!!!

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

1973 WAGES—SALARY

(Give 5% to 10% increase in salary for 1974)

Employee #	*Name*	*Semi-Monthly*
100120	Palkow	$ 583.34
100201	White	687.50
100214	Barrowclough	527.50
100311	Hyers Sr.	588.25
100324	Hoekstra Jr.	716.67
100405	Haura	854.17
100502	Ames	650.00
100612	Schwit	1,125.00
101019	Fleichner	854.10
101103	Heller	566.25
101417	Oberti	634.38
101401	Van Houwe	583.00
101611	Wanke	688.00
101624	Pezzuitti	583.00
101718	Hammes	604.17
101828	MacDonald	883.34
101925	Whitten	799.50
102021	Mars	525.00
103415	Deinzer	1,666.00
103428	Gogolen	458.00
100227	Rodshon	466.67
	Yuppa	458.00

N.B.C. HAS THE NERVE TO:

1. CUT HOURLY WAGES!!!!
2. FREEZE HOURLY WAGES!!!!
3. AFTER 18 MONTHS A PENNY RAISE!!!!

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

EXHIBIT "B"

DEPARTMENT STORE DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 177

November 29, 1974

TO THE EMPLOYEES OF N.B.C.

During the next couple of weeks you will receive information from both Union and the Company relative to the Collective Bargaining election in which you are eligible to cast a ballot on WEDNESDAY, DECEMBER 11, 1974, in the cafeteria of N.B.C.

The decision is yours to make, but we strongly feel that the one measure of difference has to be the permanent security of you and your family.

Just keep in mind the wage cuts that most of the employees were forced to take back in the early part of August, and what guarantee do you have that this can't happen again unless you vote YES on WEDNESDAY, DECEMBER 11, 1974, whereby you will have a WRITTEN CONTRACT which will spell out permanently your guaranteed wages, your guaranteed working conditions, your guaranteed benefits and pension.

Moreover your association with Teamsters Local 177 will mean a stronger and more knowledgeable collective bargaining team which will represent you in getting not just crumbs offered by management, but the fair amount of pay and other fringe benefits which are your right.

Our Union is run by the membership. You will select your own shop stewards and you and your co-workers will draw up proposals and vote on demands and a contract. Local 177, backed by the International Teamsters Union will provide the negotiators and the analysts who will help you to draw up and sustain your rightful demands.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

We ask you to be present on TUESDAY, DECEMBER 3, 1974, at the Anchor Casino, at 3:30 p.m. so we may answer any questions that you have pertaining to the National Labor Relations Board election on December 11, 1974.

PRIMO BENALE
Recording Secretary & Organizer

N.L.R.B.'s Teletype Denying Petitioner's Request for Review of the Supplemental Decision and Certification of Representative, Dated June 25, 1975

(FORM OF TELETYPE)

AXK PLS
NLRB GO AHD PLS
GSA RO NY GA
NY 031 JUNE 25
UIHHZ RUEVDEL0015 1742105—0000—RUEVDAE.
NLRB
FM MARIO LAUOR JR ASST EXEC SECY NLRB
WSH DC
TO RUEVDAE/5/PETER STERGIOS ESQ SHEA
GOULD CLIMENKO AND KRAMER 330 MADISON
AVE NY NY
TO RUEVDAE/5/WILLIAM TANIS DISTRICT 15
INTL ASSOC OF MACHINISTS 1133 MAIN ST
PATTERSON NJ
TO RUEVDAE/5/VICTOR PARSONNET ESQ
PARSONNET PARSONNET AND DUGGAN
10 COMMERCE COURT NEWARK NJ
TO RUEVDAE/5/WILLIAM CRIVELLI ASSOCIATES
774 BROAD ST NEWARK NJ
TO RUEVDAE/5/NLRB REG 22 NEWARK NJ
ST
RE NATIONAL BERYLLIA CORPORATION 22 RC
6172 EMPLOYER'S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S SUPPLEMENTAL
DECISION
AND CERTIFICATION OF REPRESENTATIVE IS
HEREBY DENIED AS IT RAISES
NO SUBSTANTIAL ISSUES WARRANTING
REVIEW. BY DIRECTION OF THE BOARD:

BT

NNN000

ONE MSG RECD OK—FAF RECD 11:15

N.L.R.B.'s Telegram Denying Respondent's Motion for Reconsideration, Dated July 21, 1975

(FORM OF TELEGRAM)

NKC 015(0838) (1-00358 1C 202)PD 07/21/75 0836
TWX GSA RO NY GA
005 NEW YORK NY JULY 21
PMS VICTOR PARSONNET ESQ
PARSONNET PARSONNET AND DUGGAN
10 COMMERCE COURT
NEWARK NJ
RE: NATIONAL BERYLLIA CORPORATION, 22-4C-6172. EMPLOYER'S MOTION FOR RECONSIDERATION OF BOARD'S DENIAL OF ITS REQUEST FOR REVIEW IS HEREBY DENIED AS IT CONTAINS NOTHING NOT PREVIOUSLY CONSIDERED. BY DIRECTION OF THE BOARD:
ROBERT VOLGER DEP EXEC SECTY
NATIONAL LABOR RELATIONS BOARD
ORDER SECT
WASH DC

No. 77-630

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BERYLLIA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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LINDA SHER,
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DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. i) is reported at 562 F. 2d 42. The decision and order of the National Labor Relations Board is reported at 222 NLRB 1289 (A. 103-115).[1] The underlying Supplemental Decision and Certification of Representative of the Board's Regional Director (S. Pet. App. 1a-23a) is unreported.[2]

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[1]"A." references are to the printed appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2]"S. Pet. App." refers to the Supplemental Appendix to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1977. The petition for a writ of certiorari was filed on October 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without holding a hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Pursuant to a representation petition filed by Local 177 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein, "the Union"), the Board conducted an election among petitioner's employees, which the Union won by a vote of 72 to 42 (A. 32).[3] Petitioner filed timely objections

[3]There was one vote for an intervening union and seven challenged ballots (A. 32).

to the election alleging, *inter alia*, that the Union had offered to waive initiation fees only for those who signed with the Union prior to the election, in violation of *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270 (A. 4, 33).[4]

In support of its "initiation fee waiver" objection, petitioner submitted to the Board's Regional Director affidavits from two employees, Louis Macaluso and Elizabeth Gulino, concerning representations allegedly made by Union Recording Secretary and Organizer Primo Benale concerning the waiver offer. Macaluso's affidavit asserted that Benale "at a mass meeting promised me and other employees of National that if we signed an authorization card * * * before the election and/or became part of a newly formed group of new employees who supported Local 177 in its efforts to organize the employees of National, we would not have to pay the $100-$150 individual initial fee * * *." The affidavit further stated that Benale had renewed his waiver promise at subsequent meetings (A. 31a-31f, S. Pet. App. 7a). Guilino's affidavit stated that Benale had told the employees that "as part of a newly formed group of employees who supported Local 177 in its efforts to organize the [Company's] employees, I would not have to pay" the initiation fee, and that "all those who signed cards before the election would become * * * a member of Local 177 without having to pay the initiation fee" (S. Pet. App. 6a).

2. The Regional Director's administrative investigation of petitioner's objections included interviews with Macaluso and Gulino (S. Pet. App. 6a). In a sworn

[4]Petitioner filed a number of other objections, all of which were rejected by the Board (S. Pet. App. 12a-22a). None of those objections are before this Court.

statement given to a Board agent, Macaluso stated that the earlier statement had been prepared by the Company and was in "error" insofar as it charged that Benale's offer to waive initiation fees had been contingent upon signing an authorization card or supporting the Union in the election. Rather, Macaluso stated that Benale had said that "any employee at National even if laid-off would not have to pay initiation fees" but that "new employees hired after a contract was signed" would be required to pay such fees (S. Pet. App. 6a-7a). He reiterated that Benale had said that "employees of National, being a newly formed group would have initiation fees waived" (S. Pet. App. 7a).[5] Gulino's affidavit, taken by the Board agent, stated that Benale had said that "once the company was organized and a contract had been signed then all new employees and any new union members would have to pay initiation fees" (*ibid.*). Her sworn statement denied that Benale had ever said that initiation fees would be waived only in exchange for preelection support of the Union; according to Gulino, Benale had "never said anything like that" (*ibid.*). She further explained that the statements attributed to Benale in her first affidavit, prepared by petitioner, referred to "my interpretation of Benale's statements and not his actual statements" (S. Pet. App. 7a-8a).

The Regional Director, pointing out that these clarifications were consistent with Benale's own affidavit and with Board interviews of other employees, dismissed the objection (S. Pet. App. 8a, 12a).

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[5]This evidence was consistent with a Union campaign letter submitted by petitioner to the Board in support of its objection. The letter stated, "there is absolutely *no* initiation fee—even if you are now laid-off, as you are still considered part of a newly-formed group" (S. Pet. App. 24a; emphasis supplied).

The Regional Director concluded (S. Pet. App. 11a-12a; footnote omitted):

> The waiver * * * made by [the Union] in its leaflet and orally was, and I so find, available to all voters in the election. As the evidence adduced during the investigation disclosed, the waiver herein was not conditioned upon the expression of support for [the Union] in any form during the electoral campaign * * *. [T]he investigation revealed that the [Union] had an established policy of waiving initiation fees for all employees during organizational campaigns regardless of whether they supported the [Union], and so advised employees of the Employer herein. In addition, I find that [the Union's] leaflet is devoid of urgings to employees to sign authorization cards. Based upon the totality of circumstances existing herein, I find that the term "newly formed group," in [the Union's] leaflet and statements could only be interpreted by the employees to include all present employees who joined the [Union] at least up to the time a collective bargaining agreement existed. In this connection, it is clear that the [Union], on a number of occasions, told employees that the waiver would apply until a "contract had been signed." Clearly, in these circumstances, the waiver was made available to all employees, not only before but subsequent to the election, since the [Union] had to be certified as the bargaining representative before a contract could be negotiated and signed.

3. Petitioner then requested Board review of the Regional Director's decision, arguing, *inter alia*, that the Regional Director should have held a hearing to determine whether the Union had made its offer to waive initiation fees contingent upon support for the Union

prior to the election.[6] To support its request for the hearing, petitioner submitted further affidavits from employees Macaluso and Gulino. Petitioner contended (A. 73) that the discrepancy between the employees' original affidavits and those later given to the Board agent was caused by "the Board Agent or Agents who interviewed the [two employees] * * * hound[ing them] into agreeing with his prejudiced version of the facts." Even in the new affidavits, however, neither employee reiterated the assertions in the original affidavits that Benale had offered the waiver only in exchange for signing authorization cards or supporting the Union prior to the election.

Rather, Gulino's latest affidavit (A. 77-82) stated that the Board agent had asked her if she knew the "meaning of perjury" and "before he began asking questions, had me raise my right hand and swear that I would be telling the truth" (A. 78).[7] She asserted that Benale had said that "as long as I was part of the group formed to organize at the plant I would be exempt from the initiation fees" (A. 80). Gulino stated that after she signed a representation card she "*thought* that since my name would be on the list of the organized group, I would not have to pay the

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[6]Petitioner also urged that the phrase "newly formed group" in the union leaflet created an ambiguity so that employees would believe the waiver was available only to those who signed authorization cards (S. Pet. App. 9a-10a). The Regional Director, distinguishing *Inland Shoe Mfg. Co.*, 211 NLRB 724 (waiver offered to "charter members"), held that "the term 'newly formed group' unlike 'charter member' does not inherently connote a requirement that the employee first join or support [the Union] in order to benefit from the waiver" (S. Pet. App. 12a, 10a-11a).

[7]Normal Board investigatory procedure requires that the affiant be asked to "swear to the truth of what he is saying" and that "[e]ither at the beginning or the ending of the dictated statement, the oath should be formally administered." National Labor Relations Board *Casehandling Manual* Section 10058.2.

initiation fees" (A. 80; emphasis supplied). She added that "what I said in my [first] affidavit is the truth as to the *meaning* of the promise as to waiver of initiation fees, even if I did not quote the language as Mr. Benale spoke it word for word" (A. 81; emphasis supplied).

Macaluso averred that although he was not positive that Benale had used the "exact words" used in Macaluso's original affidavit, "the meaning was the same" (A. 85). He added, "I am absolutely certain that Mr. Benale said that those eligible to vote would not have to pay initiation fees * * *" (A. 86).

The Board denied petitioner's request for review, stating that it raised "no substantial issues warranting review" (A. 88).

4. Thereafter, on charges brought by the Union that petitioner had refused to bargain, the instant unfair labor practice complaint was issued. The Board, on motion for summary judgment, found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (A. 109).

The court of appeals enforced the Board's order without opinion (Pet. App. i).

ARGUMENT

Petitioner repeats its argument, made to the Board and to the court of appeals, that it was entitled to an evidentiary hearing on its objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing where an administrative investigation reveals that "substantial and material factual issues exist." Thus, the sole question presented is whether

the Board properly concluded that petitioner's objections raised no "substantial and material factual issues" and could be determined without the necessity of an evidentiary hearing. The Board's resolution of this issue depended upon an evaluation of the particular facts of this case and does not warrant review by this Court.

In any event, the Board acted properly in denying a hearing. In *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270, 274 n. 4, this Court held that, during an election campaign, a union may offer to waive initiation fees only where such waivers are "available not only to those who have signed up with the union before an election but also to those who join after the election." The issue before the Regional Director, then, was whether the Union had impermissibly conditioned the waiver offer on preelection support for the Union. That determination is properly based, however, on the objective evidence of what the Union said in its written and oral communications to the employees, not on the employees' subjective notion of what the Union meant.[8] *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608.

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[8]Petitioner's additional contention (Pet. 16-18), that the Union's reference to a "newly formed group" or "charter group" was sufficiently ambiguous so that the two employees' interpretation was reasonably based is without merit. First, there is no evidence that the Union ever used the expression "charter group," since Gulino (who reported it in her first affidavit) later admitted she did not recall what words Benale used (S. Pet. App. 7a-8a). Second, the purported misleading term—"newly formed group"—did not create the ambiguity found by the Board to invalidate elections in *Inland Shoe Mfg. Co.*, 211 NLRB 724, *Coleman Co., Inc.*, 212 NLRB 927, *D.A.B. Industries, Inc.*, 215 NLRB 527, and *Rounsaville of Tampa, Inc.*, 224 NLRB 455, where offers to "charter" or "future members" implied that employees would have to become union members prior to the election in order to avoid payment of initiation fees. Here, to the contrary, it was clear that "newly formed group" meant all those currently having employee status at the Company, particularly in light of the fact that Benale repeatedly stated both in written communications and orally that there would be no initiation fee (S. Pet. App. 24a, 5a, 8a), and that only employees hired after a contract had been reached would be required to pay an initiation fee (S. Pet. App. 7a-8a). See, *e.g.*, *GTE Lenkurt, Inc.*, 215 NLRB 321, where the Board held that even the use of the term "charter member" did not create ambiguity when that term was viewed in the totality of the circumstances, which included clear and repeated expressions of union policy, consistent with *Savair*, throughout the campaign (S. Pet. App. 10a).

Moreover, although 115 employees voted in the election, including 42 against the Union, and although Macaluso and Gulino stated that from 30 to 50 employees attended Union meetings, no other employee had a version of Benale's remarks similar to that alleged by petitioner.

Petitioner argues that conflicts between the first set of affidavits and the statements to the Board agent by employees Macaluso and Gulino created a dispute over the relevant facts that could only be resolved by a hearing. While the bare allegations of the first set of affidavits secured by petitioner implied that Benale had orally conditioned the waiver on preelection support for the Union, the later statements plainly showed that the employees' first affidavits contained their subjective judgments of what Benale meant rather than a report of his actual statements. In Gulino's words, they represented only their "interpretation of Benale's statements and not his actual statements" (S. Pet. App. 8a). The Regional Director thus properly found that there was no factual conflict as to the actual statements attributable to the Union and properly concluded that the Union's waiver offer "was not conditioned upon the expression of support" during the campaign (S. Pet. App. 11a).

The third set of affidavits, secured by petitioner, did not impeach the Regional Director's original ruling that no factual conflict existed which required a hearing. Both affidavits merely confirmed the conclusion that Gulino and Macaluso, in their original affidavits, were setting forth their interpretations, not Benale's actual statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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Attorney,
National Labor Relations Board.

JANUARY 1978.

DOJ-1978-01